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No. 92-533

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NICOLE ADAMS, a Minor Child, By and Through Her Next Friend, BETTY RIDGELL, and BETTY RIDGELL, as Representative of the Estate of JULIA ALICE ADAMS,

Petitioners,

v.

THE CHILDREN'S MERCY HOSPITAL, SUZANNA ROUSHAR, R.N., CYNTHIA DOOLEY, R.N., and JANE JELINEK-BOOZALIS, M.D.

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Missouri

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 26, 1992

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QUESTIONS PRESENTED

1. Is the Due Process clause of the Fourteenth Amendment violated by a state statute limiting the amount of noneconomic damages a plaintiff may recover in a medical malpractice action because the legislature did not provide a *quid pro quo* for the common law remedy restricted by such statute?

2. Is the Equal Protection clause of the Fourteenth Amendment violated by a state statute limiting the amount of noneconomic damages a plaintiff may recover in a medical malpractice action because such statute treats medical malpractice plaintiffs differently than plaintiffs in other types of personal injury actions?

PARTIES TO THE PROCEEDINGS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Jane Jelinek-Boozalis, M.D., respectfully requests that this Court deny the Petition for Writ of Certiorari filed herein.

OPINION BELOW

Petitioners have accurately set forth in their Petition for Writ of Certiorari the citation of the opinion of the Supreme Court of Missouri and have accurately reproduced the opinion their appendix.

JURISDICTION

Petitioners claim jurisdiction lies with this Court pursuant to 28 U.S.C. §1257(a). However, jurisdiction is lacking in this Court to address Petitioners' first federal question because Petitioners failed to properly raise this federal question in the Missouri Supreme Court and because of that court's failure to pass expressly upon this question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, §1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

> any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. §538.210.1:

> 1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for non-economic damages from any one defendant as defendant is defined in subsection 2 of this section.

STATEMENT OF THE CASE

This is a medical malpractice action brought on behalf of a minor, Nicole Adams. The Petitioners originally brought this action against numerous health care providers. Certain health care providers were voluntarily dismissed from this action and, prior to trial, settlement agreements were entered into between the Petitioners and five physicians as well as two professional corporations. The present value of the settlements was $5,505,779.00. The case proceeded to trial against Children's Mercy Hospital;

two nurses, Cynthia Dooley, R.N. and Susan Roushar, R.N.; and Jane Jelinek, M.D. At the conclusion of the trial, the jury returned a verdict in favor of the Petitioners and against Respondents Children's Mercy Hospital and Jane Jelinek, M.D.

At the conclusion of the trial, the jury awarded Nicole Adams $5,848,732.00 in past and future economic damages, as well as $13,905,000.00 in past and future noneconomic damages. The jury awarded Julia Adams, Nicole's mother, $250,000.00 in past noneconomic damages and nothing for future noneconomic damages. (*See*, Petition for Writ of Certiorari, p. 3 and Appendix C attached thereto.) The jury apportioned 62% of the total fault in the case among three health care providers who had been dismissed and with whom the Petitioners had entered into settlement agreements. The remaining 38% of the total fault was apportioned among the remaining defendants in the case, with 20% apportioned to Children's Mercy Hospital and 18% to Jane Jelinek, M.D.

Pursuant to Mo. Rev. Stat. §538.210.1, the award of **noneconomic** damages was adjusted, and the trial court entered judgment for total noneconomic damages in the amount of "$430,000.00 x 2

defendants," or $860,000.00. The total judgment entered in favor of Petitioners and against Respondents was $3,082,518.16 for Nicole Adams and $95,000.00 to Julia Adams.

Although Petitioners claim they raised their federal questions at every stage of the proceedings below, the Petitioners failed to raise in the Supreme Court of Missouri the issue of whether Mo. Rev. Stat. §538.210.1 violated the Due Process Clause of the Fourteenth Amendment because no *quid pro quo* was provided by the legislature for the common law remedy restricted by such statute. Additionally, the Missouri Supreme Court did not consider nor did it expressly pass upon such issue. Therefore, the Petitioners have failed to properly raise this issue at the state supreme court level, and as a result, this Court lacks jurisdiction to address this issue.

ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Petitioners seek to challenge the constitutionality of Mo. Rev. Stat. §538.210.1 on the basis that it violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. The Missouri statute in question does nothing more than

limit the amount of **noneconomic** damages a plaintiff may recover in a medical malpractice action. The Missouri Supreme Court rejected Petitioners' arguments that this statute violated various provisions of the Missouri Constitution. Also, the Missouri Supreme Court rejected Petitioners' argument that such statute denied them equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

For the reasons set forth below, this Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

I. THIS COURT LACKS JURISDICTION TO ADDRESS PETITIONERS' DUE PROCESS CHALLENGE TO MO. REV. STAT. §538.210.1 BECAUSE OF PETITIONERS' FAILURE TO RAISE THIS ISSUE IN THE MISSOURI SUPREME COURT AND BECAUSE OF THAT COURT'S FAILURE TO PASS EXPRESSLY UPON THIS FEDERAL QUESTION.

A review of the opinion rendered by the Missouri Supreme Court reveals the lack of any reference to an argument by the Petitioners that Mo. Rev. Stat. §538.210.1 violates the Due Process Clause of the Fourteenth Amendment. The court does address a due process argument raised. However, the court is addressing solely an

argument that Chapter 538 R.S.Mo. 1986 violates the due process clause of Article I, section 10 of the Missouri Constitution. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. banc 1992). Although the Missouri Supreme Court also addresses an argument that Chapter 538 is unconstitutional because the legislature failed to provide a *quid pro quo* for the common law remedy restricted, the court does so in the context of resolving Petitioners' specific argument that Chapter 538 violates Article I, section 14 (the "open courts" and "certain remedy" provisions) of the Missouri Constitution. *Id.* at 905-906.

In *Webb v. Webb*, 451 U.S. 493 (1981), this Court discussed at length the jurisdictional requirement that the federal question at issue be properly raised, preserved and passed upon by the highest state court below.

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this

> Court can affirmatively show the contrary."

Id. at 495 (citations omitted).

Reviewing Petitioners' "Appellants' Brief" filed with the Missouri Supreme Court, it is apparent that the reason the court failed to pass upon Petitioners' due process argument is in fact because such issue was not properly raised. Petitioners' "Appellants' Brief" filed with the Missouri Supreme Court was 98 pages long. However, the only portion of the brief which can be construed as addressing Petitioners' federal due process argument is approximately one page long. This portion of Petitioners' "Appellants' Brief" is reproduced verbatim at Appendix A attached hereto.

This Respondent acknowledges that a vague reference is made in Petitioners' "Appellants' Brief" to due process of law under the Fourteenth Amendment. However, Petitioners argued that due process of law under the Fourteenth Amendment meant that a person had an opportunity to be heard at a meaningful time. (Appellants' Brief, p. 90.) In addition, the Petitioners argue that there is a constitutional right of access to the courts applicable to the state through the Fourteenth Amendment. (*Id.* at 91.) However, the Petitioners

failed to make any reference to *quid pro quo* and certainly failed to articulate in any fashion an argument that Chapter 538 violated the due process clause of the Fourteenth Amendment because no *quid pro quo* was provided by the legislature for the common law remedy restricted by the statute in question.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. at 496-497 (citations omitted). Further, this Court, in *Webb*, stated:

> At a minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution *was* presented in the state courts and that those courts **were apprised of the nature or substance of the federal claim at the time and in the manner required by state law.**

Id. at 501 (emphasis added).

Because Petitioners failed to properly raise their due process argument in the Missouri Supreme Court and because the court failed to expressly pass upon this federal question, this Court now lacks jurisdiction to address this federal question.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE RESOLUTION BY THIS COURT OF A PERCEIVED CONFLICT IN STATE COURT DECISIONS IS NOT NECESSARY AND NOT WARRANTED IN THIS CASE.

In support of the Petition for Writ of Certiorari, the Petitioners cite, quote from and rely heavily upon Justice White's dissent in *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985). In *Fein*, this Court dismissed an appeal from a California Supreme Court decision for want of substantial federal question. *Id.* at 892. The California Supreme Court had upheld the constitutionality of a California statute which placed a $250,000.00 maximum limitation on recovery of noneconomic damages in medical malpractice actions. The California Supreme Court found this statute constitutional and rejected the challenge by the plaintiff therein that the statute contravened both the due process and equal protection clauses of the Federal

Constitution. *Fein v. Permanente Medical Group*, 695 P.2d 665 (1985).

Justice White, in dissenting from the Court's decision to dismiss the appeal, indicated that there was a division among the states regarding the constitutionality of damage limits in medical malpractice actions. Justice White believed that one reason for this division was this Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). In *Duke Power Co.*, this Court addressed the Price-Anderson Act, 42 U.S.C. §2210, which placed a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident. In his dissent in *Fein*, Justice White focused on a portion of the Court's decision in *Duke Power Co.*, to wit:

> It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here. . . .

Fein, 474 U.S. at 894 (quoting *Duke Power Co.*, 438 U.S. at 88).

Justice White noted that this discussion by the Court was in response to a claim

that the limitation of liability violated due process by failing to provide those injured by a nuclear accident with an adequate *quid pro quo* for the common law right of recovery displaced by the act. Justice White then stated:

> Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.

Fein, 474 U.S. at 894-895.

Although the Petitioners appear to argue that it was both equal protection and due process concerns that motivated Justice White to dissent from the Court's decision to dismiss the appeal in *Fein*, the language of the dissent clearly focuses solely on due process concerns. Further, the Petitioners appear to argue that the due process challenge they have attempted to raise in their Petition for Writ of Certiorari is the same issue as that which Justice White, in his dissenting opinion referred to above, deemed unresolved by the Court. Presumably, the Petitioners seek to have this Court follow the

reasoning and opinion of Justice White in his dissent in *Fein* and grant the Petition for Writ of Certiorari in this action.

As noted above, the Petitioners failed to properly raise their due process challenge in the Missouri Supreme Court, and the Missouri Supreme Court failed to expressly pass upon this question. As a result, this Court, whether or not it might otherwise find it appropriate to address this federal question that it has previously declined to address, simply lacks the jurisdiction to do so. As a result, Justice White's dissent in *Fein* provides no support for Petitioners' argument that this Court should grant their Petition for Writ of Certiorari.

This Respondent asserts that there has been no significant change since this Court rendered its decision to dismiss the appeal in *Fein*. Consequently, this Court should similarly deny the Petition for Writ of Certiorari filed herein.

III. THE DECISION OF THE MISSOURI SUPREME COURT IS CONSISTENT WITH DECISIONS THAT HAVE BEEN RENDERED BY THE UNITED STATES COURTS OF APPEALS.

The Petitioners suggest that there is a split of authority among state and federal courts on the issue of the

constitutionality of statutes which limit recovery of noneconomic damages in medical malpractice actions. However, the Petitioners fail to cite a single case decided by a United States Court of Appeals where a similar statute has been found unconstitutional because it violated either the Equal Protection or the Due Process Clause of the Fourteenth Amendment. In fact, the various federal courts of appeals that have addressed the issue have found that statutes which limit recovery of damages in medical malpractice actions **do not** violate the Due Process or Equal Protection Clause of the Fourteenth Amendment. *See, Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

The decision of the Missouri Supreme Court below is consistent with the United States Courts of Appeals decisions above-referenced. As a result of this consistency, review by this Court of the Missouri Supreme Court's decision is not warranted.

IV. THE DECISION OF THE MISSOURI SUPREME COURT IS CONSISTENT WITH DECISIONS OF THIS COURT.

The Petitioners contend that the Due Process Clause of the Fourteenth Amendment requires a *quid pro quo* for the displacement of a common law remedy. As noted above, the Missouri Supreme Court did not expressly pass upon this issue because such issue was not properly raised by the Petitioners. However, if such issue had been raised and specifically addressed and rejected by the Missouri Supreme Court, such decision would have been consistent with prior Missouri appellate decisions as well as decisions of this Court.

In *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988), the Missouri Supreme Court upheld the constitutionality of Missouri's statute prohibiting dram shop liability unless the liquor licensee is convicted of selling alcohol to a person obviously intoxicated or a minor. In upholding this statute, the Court quoted from *Holder v. Elms Hotel Co.*, 338 Mo. 857, 866, 92 S.W.2d 620, 624 (1936), to wit:

> "The constitution does not forbid the creation of new rights, or the abolition of old ones recognized by

> the common law, to attain a permissible legislative objective." *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 58, 74 L.Ed. 221, 65 A.L.R. 939 [1929]. . . ."It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common law remedies."

Simpson, 749 S.W.2d at 390.

The Petitioners suggest that this Court has "strongly suggested" that the Due Process Clause of the Fourteenth Amendment requires a *quid pro quo* for the common law remedy restricted by the Missouri statute in question. In support of this argument, the Petitioners cite *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) and *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917). In fact, these decisions do not support Petitioners' argument.

In *Duke Power Co.*, this Court upheld the constitutionality of provisions of the Price Anderson Act, 42 U.S.C. §2210, which placed a dollar limit on total liability incurred by a defendant in the event of a nuclear accident. One of the arguments

raised in that case was that the liability-limiting provisions violated due process because they did not provide an adequate *quid pro quo* for the common law right of recovery which the Act restricted. In response to this argument, this Court stated:

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.

Id. at 88.

This Court went on to state that the issue need not be resolved in that case because the act in question did provide a reasonably just substitute for the common law or state tort law remedy it replaced. *Id.* However, the language of the Opinion clearly indicates that the Court doubted that the due process clause gives rise to any such *quid pro quo* requirement.

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877). The

> "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). See also, *Arizona Employers' Liability Cases*, 250 U.S. 400, 419-422 (1919). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, *e.g.*, *Silver v. Silver, supra* (automobile guest statute); *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883) (limitation of vessel owner's liability); *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F. Supp. 338 (SDNY 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel). Cf. *Thomason v. Sanchez*, 539 F.2d 955 (CA3 1976) (Federal Driver's Act).

438 U.S. at 88 n. 32.

Interestingly, the statute in question in *Silver v. Silver*, 280 U.S. 117 (1929),

cited in the footnote above, was a Connecticut statute which provided that no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by his negligent operation. The Supreme Court stated:

> We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. (Citations omitted.) Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. **Its wisdom is not the concern of courts.**

Id. at 122-123 (emphasis added).

The Petitioners attempt to take language from the *Duke Power Co.* case, which is dictum, out of context and attempt to use such dictum in support of their argument that the Court should grant their Petition for Writ of Certiorari. However, it is clear that the due process argument sought to be raised by the Petitioners in this Court is not supported by this Court's decision in *Duke Power Co.* As a result, even if Petitioners' due process argument had been properly raised and expressly passed upon by the Missouri Supreme Court adversely to the Petitioners, such decision would be consistent with this Court's decision in *Duke Power Co.* and subsequent federal courts of appeals decisions. *See, Davis v. Omitowoju*, 833 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

V. THIS COURT IS WITHOUT JURISDICTION TO ADDRESS PETITIONERS' ARGUMENT THAT STATUTORY CAPS ON NONECONOMIC DAMAGES RECOVERABLE BY MEDICAL MALPRACTICE PLAINTIFFS ARE ARBITRARY AND CAPRICIOUS IN VIOLATION OF DUE PROCESS.

The Petitioners attempt to raise the federal question that Mo. Rev. Stat. §538.210.1 violates due process because it is arbitrary and capricious. This respondent has previously demonstrated that Petitioners failed to properly raise the due process federal question in the Missouri Supreme Court and that the court failed to expressly pass upon such issue. Consequently, the Petitioners have similarly failed to properly raise in the Missouri Supreme Court and the court similarly failed to expressly pass upon Petitioners' due process argument that the statute in question is arbitrary and capricious. As a result, this Court lacks jurisdiction to consider this federal question.

In addition, the Petitioners fail to cite any authority in their Petition for Writ of Certiorari where a federal or state court has held a statute similar to Mo. Rev. Stat. §538.210.1 violates the due process clause of the Fourteenth Amendment

on the basis that such statute was arbitrary and capricious. It should be noted that the Missouri Supreme Court specifically found that the statute in question was a "rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Adams v. Children's Mercy Hospital*, 832 S.W.2d at 904.

As a result, this Court should decline to review this federal question.

VI. THE MISSOURI SUPREME COURT GAVE FULL AND CAREFUL CONSIDERATION TO THE EQUAL PROTECTION ISSUE AND DECIDED SUCH ISSUE CORRECTLY.

The Missouri Supreme Court, in addressing the equal protection issue, determined that Chapter 538 R.S.Mo. neither impinged upon a fundamental right nor did it create a suspect classification. Consequently, the Court correctly determined that the statute must be upheld if rationally related to a legitimate state interest. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 903 (Mo. banc 1992).

This Court has determined that for the purpose of equal protection analysis, a fundamental right is a right "explicitly or implicitly guaranteed by the

Constitution." *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972). This Court has also determined that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio School Dist.*, 411 U.S. at 28).

The findings of the Missouri Supreme Court that Chapter 538 R.S.Mo. neither impinges upon a fundamental right nor creates a suspect classification are consistent with United States Courts of Appeals decisions which have found that the right to sue for personal injuries and recover tort damages is not a fundamental right and that victims of medical malpractice are not a suspect class. *See, Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Hoffman v. United States*, 767 F.2d 1431, 1436 (9th Cir. 1985).

The Missouri Supreme Court correctly noted in its Opinion that "[r]ational basis review is minimal in nature." *Adams*, 832 S.W.2d at 903. This Court has noted that the rational basis test employs

a "relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 314.

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-426 (1961) (citations omitted).

This Court has determined that parties challenging legislation under the equal

protection clause "cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.'" *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153-154 (1938)). In the present case, the Missouri Supreme Court considered the "array of evidence" offered by both sides and determined that "the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Adams*, 832 S.W.2d at 904. Clearly this decision is consistent with the principles set forth in the decisions of this Court and constitutes a careful consideration by the Missouri Supreme Court of the equal protection issue and a correct decision of such issue. As a result, this Court should deny the Petition for Review.

VII. THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Mo. Rev. Stat. §538.210.1 does not bar victims of medical malpractice from seeking redress for damages caused by medical malpractice. In fact, this statute in no way affects a plaintiff's right to seek economic and punitive damages against a negligent health care provider. The statute merely limits the amount of noneconomic damages that may be recovered in a medical malpractice action. Even with this limit, the noneconomic damages allowed in the present case were $860,000.00.

As noted above, the issues Petitioners are attempting to present to this Court do not involve fundamental rights. Instead, courts have generally viewed restrictions on personal injury tort rights as a valid exercise of economic or social welfare regulation. *Boyd v. Bulala*, 877 F.2d at 1196 (citing *Duke Power*, 438 U.S. 59).

It is clear from the Petitioners' "Appellants' Brief" filed with the Missouri Supreme Court that the emphasis of their appeal with the Court was their constitutional challenges under the Missouri Constitution. This is evidenced

by the fact that only approximately one page of the "Appellants' Brief" is devoted to the constitutional challenge based on the United States Constitution. This is understandable given that the United States Courts of Appeals have uniformly rejected similar equal protection and due process challenges, and the only precedent supporting Petitioners' arguments are found in select state court decisions.

CONCLUSION

This Court lacks jurisdiction to address Petitioners' due process federal question. Further, it is clear that the Missouri Supreme Court correctly addressed and decided the equal protection issue, and this decision is consistent with Federal Courts of Appeals decisions which have upheld the constitutionality of statutes similar to the Missouri statute challenged herein. This Respondent contends that no substantial federal question is present in this case and as a result, this Respondent

respectfully requests that the Court enter its order denying the Petition for Writ of Certiorari.

Respectfully submitted,

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Missouri Supreme Court
Appellants' Brief, pp. 90-91,
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APPENDIX A

II. THE TRIAL COURT ERRED BY OVERRULING PLAINTIFFS' MOTION TO MODIFY JUDGMENT OR, ALTERNATIVELY, FOR NEW TRIAL BECAUSE THE JUDGMENT ENTRY OF MARCH 15, 1991 IS UNLAWFUL IN THAT THE CHALLENGED LEGISLATION VIOLATES SPECIFIC PROVISIONS OF THE UNITED STATES CONSTITUTION WHICH ARE (A) DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT, (B) EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, (C) RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT AND (D) THE SEPARATION OF POWERS CLAUSES

Due process of law under the United States Constitution means that a person has an opportunity to be heard at a meaningful time and in a meaningful manner. **McGowan v. Maryland, 366 U.S. 420, 426 (1961).** The Fourteenth Amendment to the United States Constitution guarantees equal protection under the law and due process of law.

That Amendment provides that:

> ... nor shall any State... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Bill of Rights. There is some authority that the United States Supreme Court recognizes a constitutional right of access to the courts applicable to the state through the Fourteenth Amendment. **Boddie v. Connecticut, 401 U.S. 371, 380-381 (1971).** In the cited case, the State of Connecticut sought to impose court fees to indigent persons seeking a divorce. The United States Supreme Court held that such court fees unconstitutionally denied such persons the right of access to the courts and are violative of due process. **Id.**

Appellants' right to Equal Protection and right to trial by jury under the U.S. Constitution also are violated by the challenged provisions of Chapter 538, as well as the federal Separation of Powers clauses. In **Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803),** Chief Justice Marshall stated that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he

receives an injury. <u>One of the first duties of government is to afford that protection</u>.

(Emphasis added).